CAPITAL INSURANCE BHD

v.

KASIM MOHD ALI

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: B-02-155 OF 1995]
6 DECEMBER 1999

CIVIL PROCEDURE: *Appeal - Record of appeal - Supplementary appeal record - Sealed copy of order appealed against not received in time - When should sealed copy be filed by way of supplementary appeal record - Whether leave to file must be obtained if time limit prescribed to file record of appeal expired - Whether appellant must show that supplementary appeal record containing sealed copy filed soon after sealed copy received - Whether date of receipt of sealed copy and date of filing supplementary appeal record must be included in chronology of events - Practice Direction No. 1/92 of the Supreme Court - Rules of the Court of Appeal 1994, rr. 18(7) & 18(10)*

CIVIL PROCEDURE: *Appeal - Record of appeal - Order appealed against - Whether photostat copy of sealed copy of order may be used - Whether sealed copy of order filed must be original, duplicate or certified true copy*

CIVIL PROCEDURE: *Appeal - Record of appeal - Sealed copy of order appealed against not included - Supplementary appeal record including photostat copy of sealed copy filed after expiry of time limit - Appellant aware of irregularities but did not take steps to cure the same - Whether appellant may now apply for extension of time to file supplementary appeal record - Whether court ought to exercise discretion to regularise record of appeal*

As a result of one Kasim Mohd Ali ('the plaintiff') obtaining summary judgment against the appellant, the appellant appealed to the Court of Appeal. At the hearing of that appeal, since the plaintiff had passed away, counsel for the plaintiff applied, firstly, to substitute the widow of the plaintiff as the respondent and, secondly, to strike out the notice of appeal and records of appeal on the ground of non-compliance with r. 18(4)(d) of the Rules of the Court of Appeal 1994 ('the Rules'). The applications were not allowed and the Court of Appeal went on to decide in favour of the appellant. Being dissatisfied, the widow and son of the plaintiff appealed to the Federal Court. The Federal Court ordered a differently constituted Court of Appeal to rehear the appeal on the merits with the widow and son as the respondents in place of the deceased plaintiff. This was the rehearing of the appeal as ordered by the Federal Court.

The respondents raised a preliminary objection to the effect that the record of appeal was bad in law and ought to be set aside for non-compliance with r. 18(4)(d) of the Rules since it did not contain the sealed copy of the order appealed from. The appellant submitted that this error was corrected by the filing of a supplementary appeal record containing a photostat copy of the sealed copy of the order. However, the respondents objected to the admissibility of the supplementary appeal record on the ground that it contravened r. 18(7) of the Rules as it was filed out of time and no leave had been obtained to file it out of time. Further, the respondents submitted that even if the supplementary appeal record was admissible, the order contained therein is not admissible since it was only a photostat copy. As opposed to this, the appellant contended that: (i) under Practice Direction of the Federal Court No. 1 of 1992 coupled with Practice Direction No. 1 of 1995, leave is not necessary to file the sealed copy of the order by way of a supplementary appeal record; (ii) even if the record of appeal is bad, the court has a discretion to cure this under r. 102 of the Rules or, alternatively, the appellant may orally apply for extension of time to file the supplementary appeal record; and (iii) as this appeal is by way of a rehearing on merits, the respondents should proceed to argue the appeal on its merits and should not be allowed to raise preliminary objections.

Held:

[1a] When the sealed copy of the order is not received in time, Practice Direction No. 1/92 of the Supreme Court allows an appellant to file without leave a sealed copy of the order not received with the notes of evidence and the judgment in a separate bundle which is called the supplementary appeal record. This filing should be done as soon as the appellant receives the sealed copy of that order.

[1b] Nowhere is it stated in Practice Direction No. 1/92 of the Supreme Court that if the filing is not done in time, that is within a reasonable time after receiving the sealed copy of the order, it could be filed without leave of the court. The onus is on the appellant to file the supplementary appeal record soon after receiving the sealed copy of the order. Rule 18(7) of the Rules makes it clear that all filing of documents must be done within a stipulated time. An appellant is not allowed to file the supplementary appeal record at any time he likes just because of the Practice Direction. Whatever supplementary appeal record to be filed pursuant to the Practice Direction must be done within the stipulated time otherwise leave of the court must be obtained.

[1c] It is the requirement of r. 18(10) of the Rules that the appellant shall submit a chronology of events until the filing of the record of appeal. The supplementary appeal record is part of the appeal record. At the very minimum, the chronology of events ought to state when the sealed order was received by the appellant or its solicitors and when the supplementary appeal record was filed. In the instant case, the chronology of events does not reveal the necessary dates. The onus is on the appellant to satisfy the court that the supplementary appeal record containing only the sealed copy of the order was filed soon after the sealed copy of the order was received by the appellant. The appellant failed to do so. Thus, the failure on the part of the appellant to apply for leave to file out of time is fatal.

[2] Copies of documents as envisaged by the Rules, especially in respect of important documents, must be the duplicate copies or certified true copies of the originals. Therefore, the sealed copy of the order filed must be the original, the duplicate or a certified true copy of the original.

[3] Even before this appeal went up to the Federal Court, the appellant knew about the objection to the admission of the appeal record. However, the appellant did not take any steps to cure the irregularities and instead ignored the mistakes made. Thus, it is too late in the day to apply for an extension of time to file the supplementary appeal record out of time. Moreover, the supplementary appeal record itself is defective and as such there is nothing for this court to extend.

[4] The Rules and Practice Directions are to be obeyed and not to be broken. Parties to an appeal must adhere and comply strictly to those rules and directions. Having considered the attitude of the appellant in ignoring the defects and irregularities, the court would not exercise its discretion to help the appellant to regularise the appeal record.

[5] The Federal Court decided on the specific question of the re-constitution of the party which was decided earlier by the other panel of this court. The issue whether the appeal record should be set aside on the ground of non-compliance with the Rules was not decided by the Federal Court. As such, the respondents have the right to raise that issue before this court. Further, the issue of non-compliance with the Rules goes to the merits of this appeal. When the appeal record is not filed or defective, there is no appeal before the court to consider.

[Appeal dismissed.]

Case(s) referred to:

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1994] 1 MLJ 312 ***(foll)***

Mat Yassin Dollah v. Ibrahim Hussin & Anor [1996] 4 CLJ 395 ***(refd)***

Nyana Pandithan v. Vettiveloo Kasinathan & Ors [1997] 1 CLJ Supp 30 ***(dist)***

Teoh Soon Kok T/A TSK Supplies Trading v. MBf Finance Bhd [1996] 2 CLJ 130 ***(foll)***

Legislation referred to:

Road Traffic Ordinance 1958, s. 96(1)

Rules of the Court of Appeal 1994, rr. 18(4)(d), (7), (9), (10), 102

Rules of the High Court 1980, O. 14

For the appellant - Manjit Singh (C Sri Kumar with him); M/s Azim Ong & Krishnan
For the respondent - Yusof Khan (BS Sidhu & Sharon Sidhu with him); M/s BS Sidhu & Co

[Appeal from High Court, Shah Alam; Civil Suit No: 23-91-1994]

Reported by S Dharmendran

JUDGMENT

Mokhtar Sidin JCA:

We have dismissed this appeal earlier when we upheld the preliminary objection raised by the respondent. We now give our reasons for doing so. To have the proper understanding of coming to that decision it is necessary to follow the chronology of events leading to this appeal.

Sometime in 1990, one Kasim bin Mohd Ali (now deceased) (hereinafter referred to as "the plaintiff") filed a writ and statement of claim against Mohd Marudi bin Kasmuri and Abd Rahman bin Derman (hereinafter referred to as "the defendants") in the High Court, Shah Alam (Civil Suit no. 23-129-90) whereby the plaintiff claimed damages from the defendants for injuries and damages suffered by him in a motor accident involving motor vehicle No. BBQ 7196, driven and owned by the defendants. The plaintiff obtained judgment against both defendants in the sum exceeding RM400,000. The plaintiff found out that that motor vehicle No. BBQ 7196 was under a third party risk cover note with the Capital Insurance Berhad (hereinafter referred to as ("the appellant"). Realising that he could not recover the full judgment sum from the defendants, the plaintiff then took up an action against the appellant. In November 1994, the plaintiff filed a writ and statement of claim against the appellant (Civil Suit No. 23-91-1994). The statement of claim was subsequently amended. In his statement of claim, the plaintiff claimed that the appellant issued a third party risk insurance policy on motor vehicle No. 7196

at the time when the accident occurred. In the statement of claim the plaintiff stated that the notice to commence proceedings of Civil Suit No. 23-129-90 was served on the appellant sometime in July 1988. Under s. 96(1), Road Traffic Ordinance 1958, the appellant being the insurer of motor vehicle No. BBQ 7196, is responsible to pay the damages awarded earlier by the court in Civil Suit No. 23-129-90 against the defendants.

The appellant on being served with the writ and statement of claim (Civil Suit No. 23-91-1994) (the present action), entered conditional appearance on 24 November 1994. Apparently no step was taken by the appellant to strike out the writ. On 9 December 1994 the plaintiff took out summons in chambers to strike out the appellant's conditional appearance and to obtain final judgment against the appellant under O. 14 of the Rules of the High Court. Before this application was heard, the appellant filed its defence to the amended statement of claim. The statement of defence was dated 28 December 1994.

On 9 February 1995 after hearing the parties the learned judge allowed the plaintiff's application for final judgment under O. 14. The appellant then appealed against the decision of the learned judge to this court. When this case came up for hearing for the first time in this court, the plaintiff had passed away. At that hearing, counsel for the plaintiff made two separate applications:

(1) to substitute one Asiah bte Abdul Manap, the widow of the plaintiff, as the respondent in the proceedings;

(2) to strike out the notice of appeal and the records of appeal on the ground that the appellant had not complied with rule 18(4)(d) of the Rules of the Court of Appeal 1994.

Apparently the then Court of Appeal advised the first application to be withdrawn. As to the second application the Court of Appeal overruled the objection. The Court of Appeal went on to hear the appeal on its merits and allowed the appeal by the appellant holding that there were triable issues and ordered that the case be remitted to the High Court for hearing.

Being dissatisfied with the decision of the Court of Appeal, the widow and the son of the plaintiff appealed to the Federal Court. The Federal Court by its judgment dated 23 July 1998 allowed the appeal and ordered that the appeal be heard by another panel of the Court of Appeal.

Hence the appeal before us now.

At the hearing of this appeal on 26 August 1999 counsel for the appellant made an application by way of a motion to substitute Asiah bte Abdul Manap and Ahmad bin Kasim (the appellants in the Federal Court) in place of the deceased plaintiff to be the respondents in the present appeal. By consent the order for substitution was made.

At the hearing counsel for the respondents, Mr. B.S. Sidhu, raised this preliminary objection on the ground that the record of appeal is bad in law and ought to be set aside for non-compliance with rr. 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. The reasons for non-compliance as stated by counsel for the respondents are:

(a) the record of appeal does not contain the sealed copy of the judgment appealed from;

and

(b) the record of appeal does not contain a copy of the order of the court appealed from.

It is necessary at this stage to look into rr. 18(4)(d) and 18(7) which read as follows:

> 18. Memorandum of appeal:
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> ...
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> (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including:
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> (a) ...
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> (b) ...
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> (c) ...
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> (d) ... a copy of the judgment, decree or order appealed from;
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> ...
>
> (7) The memorandum and copies above referred to which, together shall be called the record of appeal, shall be filed at the Registry within six weeks after the entry of the appeal or within such further time as the court may allow.
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> ...

It was submitted by counsel for the respondents that the appeal record as it is had only the draft order dated 9 February 1995 as seen at pp. 7-10 of the record of appeal. Though counsel referred to this as judgment of the court, it is clear to us that what he meant was the order. As can be seen from the record itself, the order at pp. 7-10 of the record was a draft order approved by solicitors for both sides. There is no indication that this order had been faired and approved by the Deputy Registrar of the High Court. What is more important is that it has not been sealed. There is a slight variation between

this order and the one allegedly to be the sealed order which is found in the supplementary appeal record (to which the respondents had also raised their objection).

The Supreme Court had made it clear that the judgment to be presented for entry must be a fair copy of the judgment and not a draft judgment. In the case of *Hasil Bumi Perumahan Sdn. Bhd. & Ors. v. United Malayan Banking Corp. Bhd.* [1994] 1 MLJ 312 the Supreme Court held that it must be a fair copy of the judgment that should be presented for entry in compliance with all the requirements of the Rules of the High Court 1980. A draft judgment is not a judgment since a draft implies that it needs perfection and approval.

Apparently, the appellant conceded that the order found at pp. 7-10 of the record is not the sealed copy of the order. As such we are of the view that the draft order should not be in the record. Counsel for the appellant while conceding that the order at pp. 7-10 is only a draft order, the appellant had ratified it by filing a sealed copy of the order in the supplementary appeal record.

As to the order found in the supplementary appeal record, counsel for the respondents contended that the supplementary appeal record should not be admitted because it was filed out of time which is in contravention of r. 18(7) and no leave had been obtained to file it out of time. Further, even if the supplementary appeal record is admitted the order contained therein is not admissible because it is only a photostat copy of purportedly to be a sealed copy of the order.

It is clear to us and not denied by counsel for the appellant that the supplementary appeal record was filed out of time and they have not obtained leave to do so. It was submitted by counsel for the appellant that under Practice Direction of the Federal Court No. 1 of 1992 which is applicable to the Court of Appeal with certain modifications as provided for by Practice Direction No. 1 of 1995, leave is not necessary to file the sealed copy of the order by way of a supplementary appeal record. The relevant provision in respect of the Practice Direction No. 1/92 of the Supreme Court reads as follows:

> Untuk menyegerakan prosiding rayuan di Mahkamah Agong, sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.

We agree that a supplementary appeal record containing the sealed copy of the order could be filed without leave of the court. The Practice Direction also made it clear that the filing of it should be done as soon as the appellant received the sealed order. It is not known when the sealed order was received

by the appellant or its solicitors and it is not stated anywhere when the supplementary appeal record was filed in court. We have gone through the chronology of events submitted by the appellant but we could not find the date when this was done. We are not even sure that the supplementary appeal record was ever filed at the registry. We are of the opinion that the onus is on the appellant to satisfy us that the supplementary appeal record containing only the sealed copy of the order was filed soon after the sealed copy of the order was received by the appellant. The appellant has failed to do so.

Counsel for the respondents also submitted that even though there is a Practice Direction there is a need to apply by way of formal application for an extension of time to file the supplementary appeal record out of time. It was submitted that the supplementary appeal record was filed separately from the record of appeal and it was not done within the period specified by r. 18(7). As such the filing of it was in contravention of rr. 18(7) and 18(9) of the Rules of the Court of Appeal. Counsel for the respondents cited the case *Nyana Pandithan @ M.G. Pandithan v. Vettiveloo Kasinathan & Ors.* [1997] 1 CLJ Supp. 30. With the greatest respect to counsel for the respondents there is a distinction between that case and the present appeal in that there is no Practice Direction which allows the supplementary appeal record to be filed without leave. Though we are of the view that the case is not applicable in the present appeal, we take note the issue taken by counsel for the respondents in that the Rules of the Court and the Practice Directions are to be adhered to. It is the requirement of r. 18(10) that the appellant shall submit a chronology of events until the filing of the record of appeal. Rule 18(10) provides as follows:

> (10) The appellant shall, when filing his record of appeal in the Registry, submit to the Registrar a chronology of events from the date of the action or the application was filed in the High Court to the date of filing the record of appeal in the Registry.

There is no doubt in our mind that the supplementary appeal record (rekod rayuan tambahan) is part of the appeal record. At the very minimum the chronology of events will tell us when the sealed order was received by the appellant or its solicitors and when the supplementary appeal record was filed.

It is clear to us that the Practice Direction allowed an appellant to file without leave a sealed copy of the order not received with the notes of evidence and the judgment in a separate bundle which is called the supplementary appeal record when the order was not received in time and it must be done as soon as the appellant received the sealed copy of that order. Nowhere it is stated in the Practice Direction that if it is not done in time (reasonable time after receiving the sealed copy of the order) that it could be filed without leave of the court. The onus is on the appellant that the supplementary appeal record

was filed soon after it received the sealed copy of the order. Rule 18(7) makes it clear that all filing of documents must be done within the stipulated time. It is imperative to us that an appellant is not allowed to file the supplementary appeal record at any time it likes just because of the Practice Direction. In our view whatever supplementary appeal record to be filed pursuant to that Practice Direction, it must be done within the stipulated time otherwise leave of the court must be obtained. In this appeal the appellant has not satisfied us that the supplementary appeal record was filed in time. In our opinion the failure on the part of the appellant to apply for leave to file out of time is fatal.

Another issue taken up by counsel for the respondents in respect of the supplementary appeal record is that the order contained inside is only a photostat copy and not a sealed copy or a certified true copy of the sealed copy. We have checked all the supplementary appeal record filed in the registry and they are the same as the one we are having. It is clear to us the sealed copy of the order was only photostat copies without any certification. The certification found thereon was also photostated. Counsel for the appellant admitted that the whole appeal record and the supplementary appeal record are photostat copies because the Rules of the Court of Appeal do not require the originals. They require only copies of the proceedings. Photostat copies are copies of the proceedings. With the greatest respect to the learned counsel for the appellant copies of documents as envisaged by the Rules especially in respect of those important documents must be the duplicate copies or certified true copies of the originals. It is clear to us that the sealed copy of the order filed therein must be the original, the duplicate or a certified true copy of the original. None of this is found in any of the supplementary appeal record filed in the registry. We agree with what had been said by Mohd. Hishamudin Mohd. Yunus J in the case of *Teoh Soon Kok T/A TSK Supplies Trading v. MBf Finance Berhad* [1996] 2 CLJ 130 at p. 133:

> Finally, there is one related issue: what does the word "copies" in O. 49 r. 6(3) mean in relation to "decision" in paragraph (d) of subrule (3)? Does it mean mere photostat copies of the decision? In the present case I observe that what had been enclosed in the appeal record are mere photostat copies of the draft judgment. Now, O. 29 r. 11 provides for the issuance of a duplicate of a judgment to any party to a proceeding who applies for it upon payment of the prescribed fee, and O. 52 r. 4(1)(b) provides for the issuance of a certified copy of a judgment to any person who applies for it upon payment of the prescribed fee. In my view, "copies" in relation to decisions does not refer to mere photostat copies of the decision: it refers to either duplicates of the decision obtained pursuant to O. 29 r. 11 or, alternatively certified copies of the decision obtained pursuant to O. 52 r. 4(1)(b). Uncertified photostat copies are not "copies" for the purpose of subrule (3)(d). ...

The same view was adopted by Nik Hashim Nik Ab. Rahman, JC in the case of *Mat Yassin Dollah v. Ibrahim Hussin & Anor* [1996] 4 CLJ 395.

For the reasons stated above we agree with the contention of the learned counsel for the respondents that the record of appeal is bad in law and should be set aside.

Counsel for the appellant raised the issue that even if the record of appeal is bad it is curable. He submitted that the court has a discretion to cure this under r. 102 of the Rules of the Court of Appeal. Rule 102 provides:

> 102 Non-compliance with Rules not to render proceedings void
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> Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.

Appellant's counsel urged the court to use its discretion to cure the defects and not to set aside the appeal record. Alternatively, counsel for the appellant applied orally for extension of time to file the supplementary appeal record. Counsel for the respondents made it clear to the appellant from the very beginning that they were going to object to the admission of the appeal record. They did this even before this appeal went up to the Federal Court but the appellant did nothing to ratify or take any step to cure the irregularities. They chose to ignore the mistakes they had made. In our view the Rules and Practice Directions made by this court are to be obeyed and not to be broken. We would like to stress here that parties to an appeal must adhere and comply strictly to those Rules and Directions. Of late we found that there were numerous instances where parties had not adhered or complied to those Rules and Directions and we want to make it clear that they do so at their own risk. Getting back to the appeal, it is clear to us that the appellant was given notice of the defects in the appeal record and the filing but did nothing to ratify the defects or to take the necessary step to remedy them. As submitted by counsel for the respondent the appellant knew of these defects which were pointed out to the appellant, it is too late in the day to apply for extension of time to file the supplementary appeal record out of time. Our answer to the application for extension of time is that we find the supplementary appeal record itself is defective and as such there is nothing for us to extend. Taking into consideration the attitude of the appellant for ignoring the defects and irregularities, after the respondents had pointed them out, we would not exercise our discretion to help the appellant in regularising the appeal record. We felt that the preliminary objections raised by counsel for the respondents were well taken.

Counsel for the appellant also raised the issue that this appeal is by way of rehearing on its merits in this court as ordered by the Federal Court. In view of that the respondents should not be allowed to raise preliminary objections but should proceed to hear this appeal on its merits. In our view the Federal Court in its judgment made it clear that they decided the appeal on a specific question referred to it. Chong Siew Fai, Hakim Besar Sabah dan Sarawak, delivering the judgment of the court, made this very clear in his judgment when he said:

> We note that this court granted leave to appeal on the specific question as to whether the order of the Court of Appeal dated 25th July, 1995 should be set aside since it was made after the deceased Kasim had died and no order of substitution or to carry on the proceedings under rule 41 of the Rules of the Court of Appeal 1994 had been given. The said rule 41 provides for reconstitution of an appeal in the event of certain changes affecting a party e.g. death or affecting the interest or liability of a party. Where an appellant (or a respondent) dies, the appeal does not, by that reason alone, become abate (rule 40). The proper thing to do at that stage would be for the personal representative, if any, or any person interested to apply under rule 41 for a substitution order or an order to carry on the proceedings. In our present case, on application for substitution was made to the Court of Appeal but no order was granted thereunder, resulting in the hearing of the appeal and the grant of the order dated 25th July, 1995 in proceedings in which not only a properly constituted respondent was wanting but also Mr. B.S. Sidhu purportedly acting on a retainer that had lapsed on his client's death. The fact that Mr. B.S. Sidhu was given the liberty to submit at the hearing is, to our mind, irrelevant because when he did so, there was no properly constituted party on whose behalf he could act and that what he did in the Court of Appeal was without any proper mandate or instructions.
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> On the particular facts and circumstances of this case, following *Daimler Company Ltd v. Continental Tyre And Rubber Company (Great Britain) Ltd, supra,* we are of the view that the proceedings that took place in the Court of Appeal on 25th July, 1995 are irregular, and that they together with the order made therein on the same day should be set aside.
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> This appeal is accordingly allowed with costs here and in the Court of Appeal to the estate of the deceased Kasim. All that part of the proceedings before the Court of Appeal on 25th July, 1995 connected with and leading to the making of the Order dated 25th July, 1995 as well as the said Order are hereby set aside. Since Kasim died on 12th May, 1995 i.e. after the appeal in the Court of Appeal was brought by Notice dated 10th February, 1995, the appeal had not abated. We order that the appeal be re-heard on its merits by a differently constituted panel of the Court of Appeal with the present appellants before us as the respondents in place of the deceased Kasim (if the present appellants so desire) or an application for an appropriate substitution order be made. ...

From this it is clear to us that the Federal Court decided on the specific question of the re-constitution of the party which was decided earlier by the other panel of this court. The issue whether the appeal record should be set aside on the ground of non-compliance with the Rules of the Court of Appeal was not decided by the Federal Court. As such the respondents have the right to raise that issue before us. Further, we are of the view the issue of non-compliance with the Rules is by itself a merit to be decided in this appeal. It is clear to us that when the appeal record is not filed or defective then there is no appeal before us for which we could consider.

For the above reasons we uphold the preliminary objections by the respondents. We hold that the appeal record and the supplementary appeal record are defective. We also hold that the supplementary appeal record was filed out of time without any leave of the court. Therefore, there is no proper appeal record before us for us to consider. This appeal is hereby dismissed with costs. Costs awarded is for a single counsel. Deposit to the respondent towards account of taxed costs.